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14 November 2008

Review of Regulatory Instruments
Essential Services Commission of Victoria
Level 2, 35 Spring Street
Melbourne Vic 3000

Via email: EnergyRegulatoryReview@esc.vic.gov.au

Dear Sir/Madam

RE: Review of Regulatory Instruments: Stage 1, Final Decision

Simply Energy welcomes the opportunity to comment on the Essential Services Commission of Victoria (ESC) Review of Regulatory Instruments: Stage 1, Final Decision.

Energy Retail Code

Purpose

On page 1, the threshold for domestic and small business consumers is stated to be those who consume less than '40MW/h' of electricity per year. Simply Energy suggests the Commission amend this to reflect the correct unit of '40MWh'.

Retrospective effect

The Code specifies that the terms and conditions specified by the Code apply to any market contract made before or after 1 January 2009. This retrospective effect has significant implications, and Simply Energy strongly opposes it.

Regulation should only be applied retrospectively in the most extreme of circumstances, due to the unfairness it can impose on those impacted by the regulation. A party could be found to have breached the regulation (in retrospect) in respect of a particular action even though it had had regard to, and had complied with, the regulation at the time of its action. Retrospective regulation can undermine confidence in a marketplace for consumers and retailers because parties can never be sure that they are complying with regulation yet to be imposed.

The obvious impact of the proposed Code changes applying retrospectively is that the changes to the Code would apply to all existing contracts (including market contracts) between retailers and their customers. The Commission would effectively be stepping in and changing the contractual arrangements already agreed in good faith and with regard to the then current legislation and Code requirements.

Changes to the Code that impact an existing customer in this way must be notified to the customer. Retailers may need to write to all customers informing them of the changes, which would come at significant cost.

More alarmingly, the changes could have serious unintended consequences. For instance, if the proposed changes to clause 20(b) have retrospective effect, the consequence could be that all existing market contracts for which explicit informed consent in respect of the provisions for varying the tariff was not given (explicit informed consent for this is not currently required) are void to the extent that they provide for tariff

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variations. Retailers would effectively be barred from varying their prices for these customers for the remainder of the contract term.

Simply Energy strongly urges reconsideration of this drafting decision.

Overcharging

Under section 6.3, if a retailer overcharges a customer by an amount of $50 or less, the retailer must credit the amount to the next bill issued to the customer after the retailer becomes aware of the overcharging. This is an encouraging amendment which Simply Energy believes will lessen the current administrative burden requiring a retailer to contact an overcharged customer in order to arrange reimbursement options.

In relation to paragraph 6.3(b); *must repay any amount overcharged by crediting the customer's next bill or as otherwise reasonably directed by the customer*, Simply Energy suggests adding the words 'or otherwise as soon as practicable thereafter'. This was raised during the ESC workshops and was generally agreed. Building flexibility into the timing requirement would still ensure due reimbursement, but will allow for circumstances beyond the control of the retailer where it is not actually possible to provide the refund within 10 business days.

Bill smoothing

Simply Energy notes the Final Decision is that the 6 month reconciliation timeframe is retained for bill smoothing arrangements.

In order to achieve this outcome, it would be necessary for a retailer to re-estimate the amount of energy the customer will consume over the 12 month period in the seventh month rather than the sixth. The reason for this can be illustrated by taking a calendar year as an example. If the meter reads are taken 3 months apart – on 1 January, 1 April, 1 July and 1 October – the retailer is in no position to re-estimate the amount of energy the customer will consume in the sixth month (June) because it only has consumption data in respect of the first 3 months of the year. Accordingly, paragraph 5.3(d) needs to be amended to provide 'in the seventh month of each 12 month period …' or something of similar effect.

In addition, it is necessary to begin paragraph 5.3(a) with the words 'subject to paragraph 5.3(d)', because each bill in the 12 month period will not be the same if paragraph 5.3(d) is exercised.

Undercharging

The Final Decision requires that retailers may only recover 9 months for amounts undercharged if the reason for the undercharging is due to a fault in the retailers' billing systems. In all other circumstances, they may recover up to 12 months undercharged, unless the undercharging arises as a result of meter access being blocked, or unlawful action, by the customer.

What is not clear from the drafting of paragraph 6.2(a) is whether the retailer is entitled to recover undercharged amounts in respect of consumption dating back 9 months, or whether it may recover undercharged amounts in respect of invoices issued in the previous 9 months for which less than the full amount was billed. This could be addressed by adding, in the first bullet point '…the retailer may recover no more than the amount undercharged [*in respect of energy consumed / in respect of invoices issued to the customer*] in the 9 months prior to the date…'.

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Code of Conduct for Marketing Retail Energy in Victoria

Purpose

As with the Energy Retail Code, the Code of Conduct for Marketing incorrectly refers to 40MW/h where the correct unit is 40MWh.

Clear language

The proposed new wording for clause 3.2 provides:

Marketers must have, and retailers must ensure that marketers have, adequate product knowledge. Adequate product knowledge covers knowledge of matters such as tariffs, billing procedures and the availability of rebates and concessions.

While this level of product knowledge is appropriate, this obligation is duplicated in clause 1, which regulates the training of marketing representatives. Simply Energy recommends that the wording set out above be removed from clause 3.2.

Simply Energy would be happy to discuss these comments, and any other aspect of the review of regulatory instruments, with the Commission.

Yours sincerely

Alex Fleming
Legal & Regulatory Manager